No. 89-673

In The

Supreme Court of the United States

October Term of 1989

JOHN YIAMOUYIANNIS

Petitioner,

vs.

PAUL THOMPSON, EXPRESS NEWS, BEXAR COUNTY MEDICAL SOCIETY and DR. RANDALL PRIESSIG

Respondents.

On Petition For A Writ of Certiorari To The Texas Court of Appeals For The Fourth Supreme Judicial District

BRIEF OF RESPONDENTS, THE EXPRESS-NEWS CORPORATION and PAUL THOMPSON

MARK J. CANNAN
LANG, LADON, GREEN, COGHLAN & FISHER, P.C.
NCNB Plaza, Suite 1700
300 Convent Street
San Antonio, TX 78205-3718
(512) 227-3106

Attorneys for Respondents, The Express-News Corporation and Paul Thompson

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Respondents Paul Thompson and The Express-News Corporation respectfully request this Court to deny the Petition for Writ of Certiorari, seeking review of the opinion of the Texas Court of Appeals, Fourth Supreme

Judicial District, in this case. That opinion is reported at 764 S.W.2d 338.

STATEMENT OF THE CASE

The Petitioner's claims against these Respondents, newspaper columnist Paul Thompson and his publisher, The Express-News Corporation, are based upon a newspaper column published in the San Antonio *Express-News* edition of October 25, 1985 [attached to Petitioner's Original Petition and set out verbatim in the opinion below]. As outlined in the column itself, it was written in the context of an upcoming voter referendum on fluoridation of the local water supply and was responsive to positions taken and views expressed by the Petitioner and others on the local broadcast media, views that were in opposition to the proposed fluoridation.

Petitioner brought suit against the columnist and the newspaper and additionally against the Bexar County Medical Society and its then president, proponents of fluoridation. Although various peripheral "causes of action" were referenced in the Petitioner's lawsuit, the basic thrust directed to the newspaper and its columnist was the allegedly defamatory column of October 25, 1985, attached to and incorporated in the Original Petition.

The trial court granted motions for summary judgment filed by all Defendants. The Court of Appeals in reviewing the publication in question found that the complained of statements were properly resolved by summary judgment in that they were protected statements of opinion. With respect to the Medical Society and Dr.

Preissig, it found that one alleged statement (not made or repeated in the newspaper column) had a factual basis and remanded the case to the trial court for further consideration of the cause of action against those Defendants based upon that statement. The Petitioner's Application for Writ of Error to the Supreme Court of Texas was denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS CORRECTLY HELD IN ITS WELL-REASONED OPINION THAT THE COMPLAINED OF STATEMENTS IN THE NEWSPAPER COLUMN WERE PROTECTED STATEMENTS OF OPINION UNDER THE CONSTITUTION AND ESTABLISHED CASE LAW.

It is now well established that, no matter how vigorously stated, expressions of opinion are constitutionally protected. "Under the First Amendment there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 329 (1974).

Whether viewed under the standards applied prior to *Gertz* in cases such as *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), or subjected to the four factor analysis of *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985), the newspaper column authored by Respondent Thompson and published by Respondent Express-News was a matter of opinion regarding the Petitioner from which no liability could or should arise.

In *Greenbelt* it was significant that the publication concerned "matters of local governmental interest and importance," thus signifying that the "very subject matter" was "of particular First Amendment concern." 398 U.S. at 11. Here also, similar matters of governmental interest were at the heart of the publication, the column on its face referencing the upcoming "water fluoridation . . . referendum."

Although one might agree with the observation of the Court below that the approach of the writer was not the most "ratiocinative," it is no less protected under the First Amendment, akin to the "rhetorical hyperbole" and "vigorous epithet" of *Greenbelt*. *Id.* at 14. In *Greenbelt*, such language was a response to what was perceived to be an unreasonable position by the other side in a public debate. Here also the newspaper column was in response to radio broadcasts of what was in the column labeled as the Petitioner's "wack[y] opinionation." Clearly the subject matter of the column was the very issue before the voters, i.e. fluoridation. The language used, – incomprehensible mumbo jumbo, quack, hoke artist and fearmonger – was in the context of that ballot issue of fluoridation and by any reasonable reader would have been understood as a characterization of the writer's opinions in that area and the writer's endorsement of a viewpoint. Indeed, the language relating to the Petitioner and his views was entirely consistent with the tone used in the column to characterize the views of the anti-fluoridation broadcasters upon whose programs the Petitioner appeared. That context reinforced the view of any reasonable reader that conflicting *opinions* were at issue. Clearly this view of the context in which the statements

are made should be and is a strong determinative factor in the analysis. *See Old Dominion Branch 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974).

That issue of context is central to two portions of the four factor analytical process described in *Ollman*. A look at both the "language surrounding the alleged defamatory statement" as it influences the average reader and "the broader context or setting," 750 F.2d at 979, refocuses attention upon the "intellectual Sahara" language of the headline/title of the column and the contested fluoridation issue before the voters.

Aside from the contextual aspects, the common usage or meaning of language and its verifiability are the other prongs of the *Ollman* analysis. *Id.* Here, the language used is clearly of an indefinite and ambiguous nature. For example, the term "quack" or "quackery" in the context of dispute over medical/scientific qualifications has been found to have no precise meaning. *See Kirk v. Columbia Broadcasting System*, 14 Med. L. Rptr. 1263, 1266 (N.D. Ill. 1988).[1] "Hoke" is a slang word meant variously "to flatter or speak insincerely . . . ; to kid a person; to refuse to consider seriously, to make light of; to do something in an affected overly sentimental, insincere or silly way." DICTIONARY OF AMERICAN SLANG 262 (1960). "Fearmonger" is not defined, but "fear" is an "unpleasant often strong emotion caused by anticipation or awareness

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[1] For background on the various claims and counterclaims that arise in the context of fluoridation debate see *Yiamouyiannis v. Consumers Union, Inc.*, 619 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980).

of danger . . . [or] anxious concern . . . [or] profound reverence and awe . . . [or] reason for alarm." WEBSTER'S NEW COLLEGIATE DICTIONARY 419 (1977). As for "mumbo jumbo" it has no apparent common usage or meaning that could any way subject it to verifiability. Thus, in each instance the language complained of, particularly in the context presented, offers nothing but the unverifiable viewpoint and opinion of the writer, albeit vituperatively expressed.

Only a brief response need be made to Petitioner's assertion that the opinion of the Respondents is not entitled to First Amendment protection because it is in some fashion a "false opinion" since allegedly not actually believed by the Respondents. Characterization of matter as opinion necessarily precludes further inquiry into motivation or knowledge. To allow inquiry into motivation behind opinion in order to determine liability would condition liability on an evaluation of the opinion, precisely the evil for which the Constitutional protection is designed. See RESTATEMENT (SECOND) OF TORTS (1977) §566, comment c.

Inquiry into the relationship between news and opinion and the underlying interests and beliefs of the writers and publishers is best left to continuing discussion among and the introspection of journalists. *See* E. LAMBETH, COMMITTED JOURNALISM 70 *et seq.* (1986).

II. THE COURT OF APPEALS CORRECTLY HELD THAT ERROR NOT PRESENTED TO IT WAS WAIVED.

To the extent that the Petitioner complains of non-defamation related causes of action, i.e. that there was some type of conspiracy to deny him his First Amendment free speech rights, those matters were resolved by the Court of Appeals on the basis that the Petitioner had not perfected any appeal on those points and had thereby waived them. In so ruling, the Court relied upon well established Texas law. *Prudential Ins. Co. v. J. R. Franclen, Inc.*, 710 S.W.2d 568 (Tex. 1986); *Gulf Consol. Int'l, Inc. v. Murphy*, 658 S.W.2d 565 (Tex. 1983).

Equally well established is the principle that this Court "will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

Here, the basis for the resolution of the matter on the basis of state law was not only clear from the case law, but clearly set out in the opinion of the Court of Appeals. Since no error was assigned in the lower Court to any complaint other than the Petitioner's disagreement with the characterization of the statements in the newspaper article as opinion, nothing else is before this Court as it relates to the Respondent newspaper and newspaper columnist.[2]

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[2] Petitioner's Application also makes reference to denial of his right of discovery. Although this also was dealt with adequately by the Court below, it in any event has no reference to these Respondents since the discovery in question (indeed all discovery initiated) was directed to Respondents Preissig and the Medical Society.

CONCLUSION

For the reasons set forth, Respondents Paul Thompson and The Express-News Corporation pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LANG, LADON, GREEN, COGHLAN
& FISHER, P.C.
NCNB Plaza, Suite 1700
300 Convent Street
San Antonio, TX 78205-3718
(512) 227-3106

By: MARK J. CANNAN

Attorneys for Respondents,
The Express-News Corporation
and Paul Thompson